IN THE

Supreme Court of the United States

October Term, 1944

No. 159

THE PEOPLE OF THE STATE OF NEW YORK, on the relation of JOHN PAUL SMITH,

Petitioner,

against

VERNON A. MORHOUS, as Warden of Great Meadow Prison, Comstock, New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

Petitioner prays for a writ of certiorari to review the order of the Court of Appeals of the State of New York, entered on the 25th day of May, 1944, in the proceeding upon a writ of habeas corpus. The order of the Court of Appeals (Petition, p. 8) dismissed petitioner's appeal from the Appellate Division of the Supreme Court of New York on the ground that "no substantial constitutional question is involved and that no appeal lies as of right". The Appellate Division affirmed *per curiam* the order of the Spe-

cial Term of the Washington County Court dismissing the writ and remanding the petitioner (Appellant's Brief in Court of Appeals, p. 12).

The Facts

The facts of this cause are set forth in the opinion of the Appellate Division which is as follows:

"Appeal by relator from an order of the Washington County Court, Bascom, J., entered December 18, 1942, dismissing his writ of habeas corpus and remanding him to custody.

"July 19, 1927, relator pleaded guilty to an information charging burglary, third degree, alleged to have been committed by him in the town of Horicon, July 17, 1927. This was permitted under an amendment to Sec. 222 of the Code of Criminal Procedure. (L. 1925, Chap. 597; L. 1927, Chap. 597 in effect April 4, 1927), which authorized a conviction on a plea of guilty to an information and in the absence of an indictment by a grand jury. Upon such conviction he was sentenced to Elmira Reformatory where he was confined for twenty-two months. The aforesaid procedure was declared unconstitutional in 1928. See Peo. *ex rel.*, Battista v. Christian, 249 N. Y. 314. That case however held that one so convicted had not been placed in jeopardy so as to bar his subsequent indictment and prosecution thereunder. On May 29, 1929, relator was convicted in the Supreme Court, Warren County, upon his plea of guilty to an indictment charging the same offense first heretofore stated. Thereupon sentence was suspended and relator placed on probation. In May 1931 relator was indicted in Supreme Court, Warren County, for another offense of burglary alleged to have been committed Jan. 10, 1931. This indictment was sent to the County Court for disposition. On June 23, following, at a trial term of the County Court, Warren County, the last referred to indictment was reduced to petit larceny and relator pleaded guilty thereto and sentence was suspended. At the same time the County Court revoked the relator's probation and he was sen-

tenced to Clinton Prison for a term of not less than one nor more than 2 years. This sentence relator served. On June 26th, 1940, in the Essex County Court relator was convicted of forgery, third degree. On his plea to an indictment charging that offense in three counts he was sentenced to Clinton Prison for a term of not less than five nor more than ten years. Later this sentence, on the return to a writ of habeas corpus, was declared illegal and he was remanded for resentence. This occurred in the Essex County Court on March 9, 1942 when the relator was then sentenced to a definite term of twelve years, to begin as of June 26, 1940. This sentence relator is now serving. It was passed upon him as a second offender and upon information charging him as such, and which was established by proof.

"The above history of relator's previous convictions is given because he attacks, although somewhat vaguely, the legality thereof as a basis of his attack upon his previous imprisonment, apparently claiming he should not have been sentenced as a second offender. Regardless of the authority of the County Court of Warren County to revoke relator's parole previously granted by the Supreme Court, and sentence of one to two years on the conviction obtained in the latter court on May 29, 1929, the fact remains he was legally convicted on the latter date so that when his last conviction, under sentence for which he is now serving, was obtained, he was a second offender, which fact has been duly established. Thus, relator's present sentence is lawful.

"Relator's chief complaint here is upon the score that he did not commit the crime of forgery in the third degree to which he pleaded guilty. He entered such plea when represented by counsel on June 26, 1940. He has shown nothing to impugn the legality of such conviction. The order should be affirmed.

"Order affirmed, without costs.

"All concur."

POINT I

There is no constitutional question to be reviewed.

The mere assertion by the petitioner that constitutional questions are involved does not warrant review by this court. It must appear that a constitutional question is decisive of the issue on appeal, and that the decision below could not have been on any other ground. Where as here, the decision was, in the words of the Appellate Division, and in the words of the Court of Appeals, upon grounds not involving the construction of the constitution of the State or of the United States, certiorari should not issue inasmuch as no such question is directly involved. The decision in this case was plainly upon some other ground. It did not involve the construction of the constitution of the State or of the United States.

POINT II

Certiorari should not be issued to review the proceedings in the State courts upon a writ of habeas corpus, which is a collateral attack upon the judgment of conviction.

By this application, petitioner seeks to review the dismissal of a writ of habeas corpus, the petition and brief for which alleged seven various grounds, which are repeated and expanded in the petition herein (P., p. 3, 4).

Some of these grounds (P., p. 4 [a, f, g, h, i, k, l]) presenting certain questions of fact and others (P., p. 3, [b, c, d, e, j]) presenting questions of law involving State statutes only, were disputed and resolved against the petitioner. If these actually constituted any deprivation of constitutional rights, the appropriate and exclusive remedy is appeal from the judgment of conviction.

Errors constituting denial of due process of law may be corrected in the State of New York upon application to

the court of original jurisdiction to open and review its proceedings, even after the time limited for appeal has expired (*Matter of Lyons* v. *Goldstein*, 290 N. Y. 19). The right of the New York courts to determine whether habeas corpus is an appropriate remedy is recognized by this court (*New York ex rel. Whitman v. Wilson*, 318 U. S. 688).

A very recent opinion of the Court of Appeals of the State of New York (*Matter of Vernon A. Morhous, as Warden of Great Meadow Prison* v. *The Supreme Court of the State of New York*, decided June 14, 1944, not yet officially reported), a copy of which opinion is hereto annexed, reviews the entire practice and jurisprudence of the State of New York concerning habeas corpus and its availability to correct errors, irregularities and injustices occurring upon the trial.

CONCLUSION.

This cause presents no question warranting review by this court and the petition should be denied.

Dated: July 13, 1944.

Respectfully submitted,

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